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In The

Supreme Court of the United States

October Term, 1933.

No. 855.

MRS. MARGARET SHEA LYNCH,
Plaintiff and Appellant,

v.

THE UNITED STATES OF AMERICA,
Defendant and Appellee.

REPLY BRIEF FOR MARGARET SHEA LYNCH.

Defendant in its brief takes the position that Congress may withdraw its consent to be sued in any case, where such consent has previously been given, regardless of the nature of the contract between the United States and the other contracting party, even though by doing so, a vested contract right is impaired. This position is not tenable.

While Congress may withdraw its consent to have the United States sued on a contract or obligation involving the exercise of the Government's sovereign powers, such

consent to be sued, may not be withdrawn by the Government, where the contract relates to nonsovereign functions of the United States, and rights have vested thereunder.

1. The writing of war risk term insurance by the Government as provided by act of Congress was not the exercise of a sovereign power.

The contract of war term insurance made by the United States with plaintiff's intestate was an ordinary insurance contract based on the payment of premiums by the soldier. The purchase of the insurance was optional, not compulsory. The sale of the insurance was not even remotely related to the Government's sovereign powers. As was said by Mr. Justice Holmes, in *Standard Oil Company v. United States, 267 U. S. 79*, a case relating to war risk insurance:

> "When the United States went into the insurance business, issued policies in familiar form, and provided that in case of disagreement it might be sued, it must be assumed to have accepted the ordinary incidents of suits in such business."

The Government by writing insurance, stepped down into the arena of business. It divested itself of sovereignty. In such a case it is to be treated as a citizen, rather than a sovereign.

This rule was announced by Mr. Justice Strong in *Central Pacific R. R. Company v. Gallatin, 99 U. S. 732*, as follows:

> "It is as much beyond the power of a legislature under any pretense, to alter a contract into which the Government has entered, with a private individual, as it is for any other party to a contract to change

its terms without the consent of the person contracting with him. *As to its contract the Government in all its departments has laid aside its sovereignty, and it stands on the same footing with private contractors.*"

If the writing of war risk insurance was not the exercise of a sovereign function, then the theory advanced by the United States, that the Government could withdraw its consent to be sued by reason of its sovereignty, is inapplicable.

2. The Government may not withdraw the right to sue in the case at bar, because such withdrawal impairs the obligation of plaintiff's war risk insurance contract.

When the Government enters into a business contract, not as sovereign but as an ordinary contractee as in the case at bar, the Government may not withdraw the right to sue on such contract after rights have vested in the other contracting party. The right to sue on the contract, is a part of the contract, and if the right to sue, has been impaired, the contract itself has been impaired. In our brief in support of petition for writ of certiorari, we cited in support of this proposition the following cases:

Van Hoffman v. Quincy, 4 Wall. 535;
Walker v. Whitehead, 16 Wall. 314;
Gunn v. Barry, 15 Wall. 610.

Withdrawal by the Government, of its consent to be sued, being an impairment of plaintiff's contract, rights, the withdrawal of consent to be sued, is inoperative in the case at bar.

As stated by Mr. Justice Waite, in the case of *Memphis and Charlestown Railroad Company v. State of Tennessee et al., 101 U. S. 339:*

> "The principle is elementary that a state cannot be sued in its own courts without its consent. This is a privilege of sovereignty. It is conceded that when this suit was begun the state had withdrawn its consent to be sued, and *the only question now to be determined is, whether that withdrawal impaired the obligation of the contract which the railroad company seeks to enforce. If it did, it was inoperative, so far as this suit is concerned, and the original consent remains in full force, for all the purposes of the particular contract or liability here involved.*"

We accordingly submit that the Government may not withdraw its consent to be sued, as such withdrawal would be an impairment of the contract.

3. Defendant's authorities cited do not sustain the proposition that Congress could withdraw consent to sue the United States on these insurance contracts.

None of the cases, cited and relied upon by defendant, is authority for the proposition, that where a contract is entered into by the United States in a nonsovereign capacity, for a valuable consideration, and permission to sue is given thereon, and rights have become vested thereunder, the United States thereafter, may, by legislation, abrogate such rights, cancel the contract, repeal the legislation on which the contract is based, without leaving any remedy or tribunal for the litigation of claims arising by reason of such contract.

An examination of the cases cited by defendant, shows that those cases may be distinguished in theory and principle from the case at bar.

In *United States v. Babcock, 250 U. S. 328,* and *Johnson v. Emergency Fleet Corp., 280 U. S. 320,* the actions were barred by statutory limitations.

In *Schillinger v. United States, 155 U. S. 163; Hans v. Louisiana, 134 U. S. 1;* and *Kansas v. United States, 204 U. S. 331,* no right to sue had ever been granted.

In *Kawananakoa v. Polyblank, 205 U. S. 349,* no contract was involved. The point decided was that Hawaii could not be sued without its consent with reference to land which was a part of its sovereign domain.

In *Illinois C. R. Company v. Public Utilities Commission, 245 U. S. 493,* the suit was brought in a court, not designated by statute as the proper court in which to commence the action.

In *United States v. Clarke, 8 Pet. 436,* the statute was not followed.

In *United States v. Guthrie, 17 How. 284,* jurisdiction to bring mandamus had never existed. Hence jurisdiction was not withdrawn.

In *Beers v. Arkansas, 20 How. 527,* plaintiff failed to comply with a condition precedent, namely, the deposit of the bonds sued upon, as required by statute.

In *United States v. Eckfords Executors, 6 Wall. 484,* no law authorized defendant's claim to a set-off.

In *DeGroot v. United States, 5 Wall. 419,* and *Gordon v. United States, 7 Wall. 188,* Congress relegated the plaintiffs to the court of claims. Plaintiffs were not deprived of their right to sue.

In *Gordon v. United States, supra,* the Supreme Court in commenting on the repeal of the law under which Gordon prosecuted his claim, expressly held that Congress' right to repeal a law authorizing suit against the United States is not unlimited. The language used follows:

> "The power that created this tribunal might rightfully destroy it, *unless some rights had accrued which were the result of the creation of such tribunal and inseparable from it.*"

In the case at bar, plaintiff's right under the insurance contract accrued long before the repealing act took effect.

Also see:

State of Louisiana ex rel.;
Josiah Fisk v. Police Jury of Jefferson, Left Bank, 116 U. S. 132, 134;
Cooke v. United States, 91 U. S. 389.

In *United States v. Heinszen, 206 U. S. 370,* the suit was not upon a contract. It involved the exercise of a sovereign right by the United States under its tariff laws, hence was barred.

The court in *Harris v. United States, 5 Fed. Supp. 368,* held Sec. 17 of the Economy Act (that being the section under consideration) to be unconstitutional, and the action would have proceeded had there been an allegation of a disagreement, the latter being a condition prerequisite to suit.

The court in *Harris v. United States, supra,* recognized the doctrine that consent to be sued may not be withdrawn under this state of facts.

Each case cited by the defendant, contains some element (not present in the case at bar) which deprives plaintiff of his right to sue, such as, failure to comply with a condition precedent; failure to file the claim within the statutory limitation; failure of Congress originally to grant a right to sue; vesting jurisdiction in a different tribunal than the one in which suit was brought; or where the exercise of a sovereign power defeated the right to litigate the claim.

Defendant bases its right to withdraw its consent to be sued in this case, on its *status* as a sovereignty. However, as the contract at bar was not made in the exercise of any of the sovereign powers of the Government, but in its private or nongovernmental capacity, the relation was one of debtor and creditor. And since rights vested under that contract long prior to the withdrawal of defendant's consent to be sued, plaintiff is deprived of property, without due process of law, in violation of the Fifth Amendment to the Constitution of the United States, by the cancellation of the contract of insurance, and by abrogation of the right to sue thereon.

CONCLUSION.

1. The writing of war risk term insurance was not the exercise of a sovereign power.

2. Withdrawal of the right to sue on said insurance contract impaired the obligation of the contract.

3. Defendant's authorities do not sustain the proposition that Congress could withdraw consent to sue the United States on these contracts.

RELIEF SOUGHT.

The judgment of the Fifth Circuit Court of Appeals in this case should be reversed.

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